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Rethinking the American Family Law

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INTRODUCTION
"RETHINKING" AMERICAN FAMILY LAW

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Few areas of the law have witnessed more extensive or more dynamic change than domestic relations law in the last decade. Perhaps the single greatest development during this period was the widespread adoption by most states of a "no-fault" ground for divorce, a development that occurred with such alacrity once it got underway that is now passe. Other significant developments, some of which are continuing, were the move toward equitable distribution schemes by common law or "title" states; changing notions of the state-parent-child relationship in terms of decisionmaking for children, particularly medical decisionmaking and decisionmaking as to what constitutes adequate parenting; and the increasing role of the Constitution in family law, especially regarding procreational choice.

The process of change continues at an ever-increasing pace. One need only look at the topics covered in this symposium to gain an awareness of issues of current interest in domestic relations law. These issues can be grouped under two broad headings: (1) economic issues, i.e., resolving the economic issues between the parties, such as alimony, child support, and property division (mediation could be included here because it is principally an alternate means by which economic issues are resolved); and (2)

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"people" issues, which often require assessing the personal relationships between parties or between parties and the state, e.g., custody of children, child abuse, abortion, and adoption (mediation could be included here as well because it is frequently employed as a means to resolve personal issues between the parties).

A great deal of "rethinking" of traditional doctrines in domestic relations law has occurred in recent years, especially with respect to the economic issues. Indeed, in legal education so much classroom time is now devoted to coverage of the economic consequences of marital breakdown that this area of domestic relations law is practically a subject in its own right.[1]

The theoretical bases of spousal support have been examined and reexamined. Since *Orr v. Orr*,[2] of course, alimony has been sex-neutral, but both before and after *Orr* the underlying theories of spousal support have been questioned, even to the point of questioning the continued need for post-divorce alimony, at least in its present form.[3] The Uniform Marriage and Divorce Act, for example, provides for alimony only if the spouse seeking it lacks sufficient property to satisfy his or her needs and is unable to support himself or herself through employment, if appropriate.[4] Some states provide only for "rehabilitative" alimony for a limited period of time following dissolution of the marriage.[5]

Another economic issue that has undergone considerable reexamination is that of allocation of property of the parties upon divorce. There are eight community property states in the country,[6] and the remaining forty-two are common law or "title" states. During the last several years, however, all of the common law states have adopted some form of "deferred community" approach to marital property. By 1974, all but fifteen common law

1. A new casebook on the subject of resolving the economic issues was published within the last year. J. KRAUSKOPF, CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION (1984). New editions of existing casebooks typically give expanded coverage to the economic issues. *See, e.g.*, W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS, 987-1252 (1984). Much of the recent literature in family law is addressed to "rethinking" some of the economic consequences of marital breakdown, or in some cases, of nonmarital breakups. *See, e.g.*, W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION (1983); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553 (1984). Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263 (1984); Reppy, *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984).

2. 440 U.S. 268 (1979).

3. *See, e.g.*, Olsen v. Olsen, 98 Idaho 10, 12-22, 557 P.2d 604, 606-16 (1976) (Shepard, J., dissenting).

4. UNIFORM MARRIAGE AND DIVORCE ACT § 308(a) (1973); *see also* IDAHO CODE § 32-705(1) (1983).

5. *See, e.g.*, N.H. REV. STAT. ANN. § 458:19 (1983) (rehabilative alimony limited to three years).

6. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY, § 5.14 (1984).

states had adopted such an approach; by 1976 the number of holdouts had dwindled to nine; by 1982 the number had shrunk to two; and by 1983 all had abandoned the pure common law approach.[7] Equitable distribution is such a growing and thriving movement today that a new journal has been inaugurated to keep up with its fast-paced developments.[8]

One of the economic consequences of dissolution of marriage relates to treatment of alimony, child support, and property division under the federal and state income tax laws. Since the Supreme Court's decision in *United States v. Davis*,[9] a transfer by one spouse to the other of appreciated property, in exchange for a release of marital rights by the other spouse, has been regarded as a taxable event, with the result that any gain from appreciation was taxable to the transferor.[10] This past year, however, Congress enacted the Tax Reform Act of 1984.[11] One of its principal changes, which are numerous and complex, is the overruling of the *Davis* case. Under the new provision,[12] no gain is recognized on transfers between spouses or between former spouses incident to divorce.[13]

Not all current developments in domestic relations law have been of the economic variety. Some of the developments affect the "people" issues or personal relationships between the parties or the parties and the state. Here, too, courts and commentators in particular have engaged in "rethinking" some of the traditional doctrines prevalent in domestic relations law. A current experiment in child custody determination, for example, is the concept of joint custody, and the scholarly literature on the subject is burgeoning.[14]

Child custody generally is undergoing reexamination. For

The eight community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Id.*

7. Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263 & n.1 (1984). West Virginia, by judicial decision, was the last state to abandon the pure common law approach. *Id.* Immediately afterwards the legislature enacted an equitable distribution statute. *See* Special Topic, *Equitable Distribution*, 87 W. VA. L. REV. 87 (1984).

8. *See* EQUITABLE DISTRIBUTION JOURNAL. This journal is a monthly publication in newsletter format published by the National Legal Research Group, Inc., of Charlottesville, Virginia.

9. 370 U.S. 65 (1962).

10. The gain realized by the transferor was the difference between present fair market value less the original value or cost basis. Present fair market value became the basis in the property of the transferee. United States v. Davis, 370 U.S. 65, at 71-73 (1962).

11. The Tax Reform Act of 1984 was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (to be codified in scattered sections of 26 U.S.C.).

12. 26 U.S.C.A. § 1041 (Dec. 1984 Pamphlet).

13. In addition, under the new provision the transferee takes the basis of the transferor in the property. 26 U.S.C.A. § 1041 (Dec. 1984 Pamphlet).

14. *See, e.g.*, JOINT CUSTODY AND SHARED PARENTING (J. Folberg ed. 1984); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641 (1983); Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C.D. L. REV. 739 (1983); Kelly, *Further*

example, the "tender years" presumption, by which the mother of a child of tender years is presumed to be entitled to custody of the child, has been questioned. In *Garska v. McCoy*,[15] the West Virginia Supreme Court of Appeals abandoned the traditional tender years presumption in favor of a sex-neutral "primary caretaker" presumption.[16]

Another child custody doctrine undergoing rethinking is the parental rights doctrine, the rule that in a child custody dispute between a parent and a third party, the parent has a right to custody of the child absent a strong showing of unfitness. Of particular interest has been the concept of "psychological parenthood" as introduced or at least given high visibility by Goldstein, Freud, and Solnit in 1973.[17] If courts have not enthusiastically adopted the concept of psychological parenthood in name, some certainly have been influenced by it.[18] In the meantime, professionals in law and the social sciences have continued an ongoing dialogue on the concept of parenthood generally and the validity of the psychological parenthood concept as applied to child custody decisionmaking.[19]

Scholars have continued to explore such diverse matters as the nature of childhood itself,[20] the effects of divorce on children,[21] and

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Observations on Joint Custody, 16 U.C.D. L. REV. 762 (1983); Nestor, *Developing Cooperation Between Hostile Parents at Divorce*, 16 U.C.D. L. REV. 771 (1983); Reece, *Joint Custody: A Cautious View*, 16 U.C.D. L. REV. 775 (1983). For a judicial view of the joint custodial arrangement see *In re* Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983).

15. ___ W. Va. ___, 278 S.E.2d 357 (1981).

16. *Id.* at ___, 278 S.E.2d at 362-63. The primary caretaker is the parent who has taken primary responsibility for:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. at ___, 278 S.E.2d at 363.

For more recent applications of the primary caretaker presumption see T.C.B. v. H.A.B., ___ W. Va. ___, 317 S.E.2d 174 (1984); J.E.I. v. L.M.I., ___ W. Va. ___, 314 S.E.2d 67 (1984). For a comentary on abolition of the tender years presumption in one jurisdiction see Note, *Coming of Age in Alabama: Ex parte Divine Abolishes the Tender Years Presumption*, 34 ALA. L. REV. 305 (1983).

17. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). The same three authors collaborated on a later book that further explored the psychological parenthood concept. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979).

18. *See, e.g.*, Guardianship of Phillip B., 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983); Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

19. *See, e.g.*, *The Impact of Psychological Parenting on Child Welfare Decision-making*, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1984); *see generally* Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).

20. *See, e.g.*, F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982).

21. *See, e.g.*, CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT (I. Stewart

the delicate and often controversial relationship between the child, the parent, and the state.[22] In regard to the latter, controversy typically centers on whether children are to be accorded more autonomy than has traditionally been the case or should be accorded increased protection because of their status as minors. The conflict between the autonomy and protection models nowhere has been more painfully obvious or controversial than in the abortion decisions.[23] Equally controversial, in terms of the conflict between parental and state authority, have been the medical decisionmaking cases.[24]

Related to the above cases are those involving child abuse, because here, too, is found conflict between parental views and authoritarian views, represented by the state, of what constitutes adequate parenting.[25] Cases of sexual abuse especially have captured the public's attention as a result of increased media

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& L. Abt eds. 1981); J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Young Children,* 54 AM. J. ORTHOPSYCHIAT. 444 (1984); Heatherington, *Effects of Divorce on Parents and Young Children,* in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (M. Lamb ed. 1982); Wallerstein & Kelly, *Effects of Divorce on the Father-Child Relationship,* 137 AM. J. PSYCHIAT. 1534 (1980); Heatherington, *Divorce: A Child's Perspective,* 34 AMER. PSYCHOL. 851 (1979).

22. *See, e.g.,* N. REPUCCI, L. WEITHORN, E. MULREY & J. MONAHAN, CHILDREN, MENTAL HEALTH, AND THE LAW (1984); WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT (W. Gaylin & R. Macklin eds. 1982); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests,* 81 MICH. L. REV. 463 (1983); Keiter, *Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach,* 66 MINN. L. REV. 459 (1982).

23. *Compare* City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2498-99 (1983) (city ordinance requiring written consent from parent or guardian for a minor under 15 to have an abortion unless the minor obtained a court order authorizing the abortion held unconstitutional because it did not offer a consent substitute affording a minor an opportunity to demonstrate that she is sufficiently mature to decide for herself or that despite her immaturity, the abortion would be in her best interests) *with* Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517, 2526 (1983) (statute requiring parental or court consent for unemancipated minor to have an abortion upheld on the ground it offered appropriate alternatives).

24. *See, e.g.,* Guardianship of Phillip B., 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983); Custody of a Minor, 378 Mass. 732, 393 N.E.2d 836 (1979); Matter of Hofbauer, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979). For commentary on the problem generally see A. HOLDER, LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE (2d ed. 1985); Baron, *Medicine and Human Rights: Emerging Substantive Standards and Procedural Protections for Medical Decision Making Within the Family,* 17 FAM. L.Q. 1 (1983); Note, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State,* 58 N.Y.U. L. REV. 157 (1983); Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions,* in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982).

Within this already controversial area, perhaps the cases involving the greatest emotion and, therefore, generating the greatest controversy, are the so-called "Baby Doe" cases. *See, e.g.,* United States v. University Hosp., 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd,* 729 F.2d 144 (2d Cir. 1984); Weber v. Stony Brook Hosp., 95 A.D.2d 587, 467 N.Y.S.2d 685, *aff'd,* 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983). Some states have enacted legislation in response to the problem of when, if at all, life support may be withdrawn from an infant. *See, e.g.,* IND. CODE ANN. § 31-6-4-3(f) (Supp. 1984); LA. REV. STAT. ANN. § 40:1299.36.1- .3 (Supp. 1985). The Louisiana statute was interpreted in *In re* P.V.W., 424 So. 2d 1015 (La. 1982). For general commentary on the issue of medical decisionmaking for newborn infants see R. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS (1984); Ellis, *Letting Defective Babies Die: Who Decides,* 7 AM. J.L. & MED. 393 (1982).

25. What, for example, constitutes the dividing line between permissible parental discipline and impermissible, prohibited child maltreatment? *See, e.g.,* People v. Jennings, 641 P.2d 276 (Colo. 1982); Bowers v. State, 283 Md. 115, 389 A.2d 341 (1978).

coverage.[26] Child abuse is a pervasive problem, characterized by one court as "the most pernicious social ailment which afflicts our society."[27] The emotion-generating phenomenon has produced numerous legal issues to which legislatures and courts alike have been responsive,[28] and scholarly commentary on the subject has continued to flourish.[29]

By far the most provocative, challenging and, if one is permitted a bias, interesting development in family law has been the move toward redefining the outer limits — medical and legal — of procreative choice.[30] Ironically, the events drawing the most attention are at opposite ends of the procreative choice spectrum: on one end, the decision to have children although by nontraditional means, such as *in vitro* fertilization, surrogate motherhood, or artificial insemination, and on the opposing end, the decision not to have children, through abortion. In both cases, advances in medical technology have placed enormous pressure on the legal system to meet the challenges posed by the new technology. The consequence of failure is that the gap between medicine and law will continue to widen, resulting in increased confusion and uncertainty on such crucial questions as when life begins, when it is entitled to protection and when the parent-child relationship is — and is not — created.

One writer has coined the term "collaborative conception" to refer to the various means by which a man and woman might use the participation of third parties in the conception or gestation of a child.[31] The legal issues associated with collaborative conception are at once fascinating and problematical, ranging from the issue of paternity in the case of artificial insemination[32] to the issue of maternity in the case of surrogate motherhood[33] to broad-range

26. *See, e.g.*, NEWSWEEK, September 10, 1984, at 14, 19; *Id.*, August 20, 1984, at 44; *Id.* May 14, 1984, at 30.

27. Goldade v. State, 674 P.2d 721, 725 (Wyo. 1983).

28. No attempt is made here to set forth these issues since they are the subject of an article submitted as a part of this symposium. *See* Davis, *Child Abuse: Pervasive Problem of the 80s.* 61 N.D. L. REV. 193 (1985).

29. Here, also, no attempt is made to set forth an exhaustive compendium of the literature on child abuse. Two recent entries are M. LYNCH & J. ROBERTS, CONSEQUENCES OF CHILD ABUSE (1982) and E. NEWBERGER, CHILD ABUSE (1982). Others are mentioned in Davis, *supra* note 28, at nn. 1 & 4 (1985).

30. A colleague at the University of Georgia School of Law, Paul M. Kurtz, recently asked this author to review a draft of a chapter — titled "Procreational Liberties" — of a forthcoming Family Law casebook. The author was impressed not only with the quality of the writing and the breadth of careful coverage given this important topic, but equally impressed with an objective, abstract truth — that virtually every time a writer puts pen to paper on this fast-developing subject, the coverage is more timely than anything else already in print.

31. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,* 69 VA. L. REV. 405, 410 (1983).

32. *See, e.g.*, R.S. v. R.S., 9 Kan. App. 39, 670 P.2d 923 (1983).

33. *See, e.g.*, Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983); Doe v.

medico-legal ethical issues inherent in the concept — and practice — of *in vitro* fertilization.[34]

On the other end of the continuum, medical advances that now make it possible to preserve the life of foetuses at an earlier and earlier point in the gestation period effectively have moved the point of viability closer to conception.[35] Perhaps the Supreme Court thought of viability as a more or less static term when it used that stage to delineate the point at which the state's interest in foetal life was greatest in *Roe v. Wade*.[36] Medical redefinition of viability may force the Court to rethink the tri-semester medical model first implemented in *Roe v. Wade*.[37]

The dilemma, then, is as follows. Because life can now begin on a laboratory dish and the fertilized embryo implanted in a woman's womb, medical science is in the process of redefining conception and gestation — and perhaps parenthood — in nontraditional terms. Because a prematurely delivered foetus can now be kept alive at an earlier point than previously thought possible — and, indeed, correct research is on the verge of breakthroughs that may move the point to an even earlier stage — medical science is in the process of redefining viability. These developments have far-reaching implications for family law. Law must respond to the changes wrought by the new technology. As long as legal rules continue to be based on medical premises, as the premises change, so must the legal rules. The path of medical science is, by nature, often experimental, but today's experiment is frequently tomorrow's reality. The task of legislatures and courts is to meet the current medical realities with informed and creative solutions.

The list of current issues outlined here is by no means exhaustive. Even among the few issues mentioned, however, any one would furnish the basis for thought-provoking, controversial,

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Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

34. Perhaps the most thought-provoking and issue-generating case is one from Australia reported in June 1984. A California couple died in 1983, leaving two frozen embryos produced from their sperm and ova in 1981. Washington Post, June 18, 1984, at A4, col. 2. Were the embryos "persons"? To whom did they belong? Did they "belong" to anyone?

For an attempt by an American court, representing the "legal system," to deal with the perplexing problems posed by the *in vitro* technology, see Smith v. Hartigan, 556 F. Supp. 157 (N.D. Ill. 1983).

The most thoughtful discussion of artificial or "collaborative" conception generally is Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983).

35. The new technology is described and its implications for family law discussed in Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451 (1984); *see also* Kleiman, *When Abortion Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances*, N.Y. Times, Feb. 15, 1984, at B1, col. 1.

36. 410 U.S. 113 (1973).

37. *See* Rhoden, *supra* note 35, at 1499. Evidence that some members of the Court are rethinking

creative dialogue. Domestic relations law, like criminal law, is "people" oriented, "people" centered. People change, individually and collectively as a society. Values change; priorities change; institutions change. Ideas, definitions, theories, concepts, processes — all change. Domestic relations law itself is in a state of transition, a state in which old values and old doctrines are being rethought and in the process, rewritten. The challenges are real and exciting. The expectations are high. The prospects are encouraging. The time is now.

the issue is found in one of the Court's most recent abortion decisions. City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2504-12 (1983) (O'Connor, J., dissenting).